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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JOHN BRIDGELAL and WILKINS BELLIARD, Individually and on Behalf of All Others Similarly Situated, **Plaintiffs,** **-against-** **NY RENAISSANCE CORP., DAN PIRVULESCU and MONIQUE DELACROIX, Jointly and Severally,** **Defendant.**	**No. 15 Civ. 3571 (ADS)(AKT)**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM

TABLE OF CONTENTS

Page

Table of Authorities ii

STATEMENT OF FACTS 1

ARGUMENT 2

I. THIS COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER DEFENDANT'S STATE-LAW COUNTERCLAIMS 2

A. There Is No Independent Basis of Jurisdiction for Defendant's Counterclaims 2

B. Defendant's Counterclaims Are Permissive, Not Compulsory 2

C. Defendant's Counterclaims Do Not Form Part of the Same Case or Controversy as Plaintiffs' Claims 6

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Achtman v. Kirby, McInerney & Squire, LLP,
464 F.3d 328 (2d Cir. 2006)....................6

Brennan v. Heard,
491 F.2d 1 (5th Cir. 1974)....................8, 9

Bullion v. Ramsaran,
No. 07-cv-61463, 2008 U.S. Dist. LEXIS 65833 (S.D. Fla. July 7, 2008)....................8

Critical-Vac Filitration Corp. v. Minuteman Int'l, Inc.,
233 F.3d 697 (2d Cir. 2000)....................3

Hart v. Rick's Cabaret Int'l, Inc.,
967 F. Supp. 2d 901 (S.D.N.Y. 2013)....................8

Hutton v. Grumpie's Pizza & Subs, Inc.,
No. 07-cv-81228, 2008 U.S. Dist. LEXIS 37425 (S.D. Fla. May 6, 2008)....................5

Jacques v. DiMarzio, Inc.,
200 F. Supp. 2d 151 (E.D.N.Y. 2002)....................9

Jones v. Ford Motor Co.,
358 F.3d 205 (2d Cir. 2004)....................3, 5

Jones v. JGC Dallas LLC,
No. 11-cv-2743, 2012 U.S. Dist. LEXIS 133867 (N.D.. Tex. Aug. 17, 2012)....................9

Jung v. Chorus Music Studio, Inc.,
No. 13-cv-1494, 2014 U.S. Dist. LEXIS 128103 (S.D.N.Y. Sept. 11, 2014)....................5

Kreinik v. Showbran Photo, Inc.,
No. 02-cv-117, 2003 U.S. Dist. LEXIS 18276 (S.D.N.Y. Oct. 10, 2003)....................9

LaChappelle v. Torres,
No. 12-cv-9362, 2014 U.S. Dist. LEXIS 109780 (E.D.N.Y. Aug. 7, 2014)....................2

Lyon v. Whisman,
45 F.3d 758 (3d Cir. 1995)....................7

Montefiore Medical Ctr. v. Teamsters Local 272,
642 F.3d 321 (2d Cir. 2011)....................6

Morris v. Blue Sky Mgmt., LLC,
No. 11-cv-979, 2012 U.S. Dist. LEXIS 19731 (W.D. Mo. Feb. 16, 2012)....................3-4, 7, 8

Nelson v. CK Nelson, Inc.,
No. 07-cv-61416, 2008 U.S. Dist. LEXIS 43544 (S.D. Fla. June 2, 2008) 6, 9

Noriko Ozawa v. Orsini Design Assocs.,
No. 13-cv-1282, 2015 U.S. Dist. LEXIS 29933 (S.D.N.Y. Mar. 11, 2015) 5, 8

Quintana v. Explorer Enters.,
No. 09-cv-22420, 2010 U.S. Dist. LEXIS 54683 (S.D. Fla. June 3, 2010) 8-9

Rivera v. Ndola Pharm Corp.,
497 F. Supp. 2d 381 (E.D.N.Y. 2007) 7

Torres v. Gristede's Operating Corp.,
628 F. Supp. 2d 447 (S.D.N.Y. 2008) .... *passim*

United Mine Workers of Am. v. Gibbs,
383 U.S. 715 (1966) 6

United States v. Aquavella,
615 F.2d 12 (2d Cir. 1979) 3

Vizcaino v. Techcrete Constr., Inc.,
No. 13-ca-229, 2014 U.S. Dist. LEXIS 26570 (W.D. Tex. Mar. 3, 2014) 8

Weber v. Fujifilm Med. Sys. U.S.A.,
No 10-cv-401, 2011 U.S. Dist. LEXIS 19119 (D.Conn. Feb. 28, 2011) 6-7, 8

Wermann v. Excel Dentistry, P.C.,
No. 13-cv-7038, 2014 U.S. Dist. LEXIS 29091 (S.D.N.Y. Feb. 25, 2014) 9

Yankelevitz v. Cornell Univ.,
No. 95-cv-4593, 1996 U.S. Dist. LEXIS 11298 (S.D.N.Y. Aug. 7, 1996) 9

Yeseren v. CKSINGH Corp.,
No. 10-cv-253, 2010 U.S. Dist. LEXIS 112122 (M.D. Fla. Oct. 13, 2010) 8

STATUTES, RULES, AND REGULATIONS

28 U.S.C.
1367(a) 2, 3, 6

29 U.S.C.
§ 201 1

NYLL
§ 195..1
§ 650..1

Federal Rules of Civil Procedure
12(b)(1) 2
13(a) 3

STATEMENT OF FACTS

This Fair Labor Standards Act collective action and New York Labor Law class action commenced on June 18, 2015. Defendants filed an Answer denying all material allegations and asserting counterclaims on September 18, 2015.

John Bridgelal ("Bridgelal") and Wilkins Belliard ("Belliard" and, collectively with Bridgelal, the "Plaintiffs") are, respectively, a former glazing mechanic and a former foreman who worked for Defendants' construction business. (Compl. ¶ 1). The Plaintiffs bring this action on behalf of themselves as well as Defendants' other glazing mechanics, laborers, helpers and foremen to recover unpaid overtime premiums pay pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.* and the New York Labor Law ("NYLL"), §§ 650 *et seq.* and the regulations promulgated thereunder; damages for violations of NYLL § 195 requiring that employers distribute wage statements and wage notices to employees; liquidated damages; interest; and attorneys' fees and costs. Plaintiffs allege that they were paid straight-time rates or less for all hours worked even though they typically worked well in excess of forty (40) hours per week. Plaintiffs received paystubs that clearly show that they received straight time rates for all recorded hours even when the number of hours exceeded forty (40) in a given workweek.

Defendants' Answer to Plaintiffs' Collective and Class Action Complaint (the "Complaint") contains forty-three (43) Affirmative Defenses and three (3) counterclaims styled, respectively, "Monies Lent," "Monies Had and Received" and "Unjust Enrichment." Defendant NY Renaissance Corp. ("NY Renaissance") alleges that Plaintiff Belliard requested, and was given, a loan of five thousand dollars ($5,000.00), which he did not pay back in spite of Defendant NY Renaissance's request that he do so. Plaintiff Belliard absolutely denies that any such loan ever was made.

Plaintiff Belliard moves to dismiss this action under Federal Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.

ARGUMENT

I. THE COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER DEFENDANT'S STATE-LAW COUNTERCLAIMS

A. There Is No Independent Basis of Jurisdiction for Defendant's Counterclaims

This Court does not have original subject matter jurisdiction over Defendant's permissive counterclaims since they does not raise a federal question, the parties are not diverse, and the claim does not meet the monetary threshold for diversity jurisdiction. Defendant alleges that NY Renaissance is formed and organized under the laws of New York and that Belliard resides in New York, which allegations Plaintiffs admit. Further, Defendant neither alleges that the counterclaims exceed the $75,000 amount in controversy minimum for invoking diversity jurisdiction nor gives any indication that the relief sought exceeds $75,000. To the contrary, it appears that Defendant requests total relief of fifteen thousand dollars ($15,000), plus an unspecified amount of interest, costs, attorneys' fees and disbursements. Because the claim raises no federal question, the parties reside in the same state and Defendant gives no explanation as to how the claims could possibly exceed $75,000, there is no independent basis for jurisdiction of the counterclaims.

B. Defendant's Counterclaims Are Permissive, Not Compulsory

By enacting 28 U.S.C. § 1367(a), Congress added a new basis of jurisdiction for "all other claims" in a civil action, labeled "supplemental jurisdiction." 28 U.S.C. § 1367(a); *see also LaChappelle v. Torres*, No. 12-cv-9362, 2014 U.S. Dist. LEXIS 109780, at *14 (E.D.N.Y. Aug. 7, 2014) (parties "may pursue their state law claims in federal court only if those claims fall within the Court's supplemental jurisdiction"). In cases where courts do not have original jurisdiction over counterclaims, they may in some circumstances exercise supplemental jurisdiction over such claims.

Federal Rule of Civil Procedure 13 divides counterclaims into two categories: compulsory and permissive. Compulsory counterclaims are those that "arise out of the same transaction or occurrence" as the claims in the complaint and must be stated in a party's responsive pleading. F.R.C.P. 13(a). Due to the relationship between original claims and compulsory counterclaims, based on the common transactions or occurrence out of which they arise, federal courts have supplementary jurisdiction over compulsory counterclaims. *See Jones v. Ford Motor Co.*, 358 F.3d 205, 209, 213-14 (2d Cir. 2004) (discussing supplemental jurisdiction pursuant to § 1367(a)).

The Second Circuit has explained that a counterclaim will be considered compulsory "when there is a 'logical relationship' between the counterclaim and the main claim," a test that requires that "'the essential facts of the claim must be so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit.'" *Jones*, 358 F.3d at 209 (quoting *United States v. Aquavella*, 615 F.2d 12, 22 (2d Cir. 1979) and *Critical-Vac Filtration Corp. v. Minuteman Int'l, Inc.*, 233 F.3d 697, 699 (2d Cir. 2000) (internal alterations omitted)).

This standard is not satisfied where "[t]he only possible connection between Plaintiffs' overtime claims and the counterclaims is that they arise out of the same employer-employee relationship." *Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447, 467-68 (S.D.N.Y. 2008); *see also Morris v. Blue Sky Mgmt., LLC*, No. 11-cv-979, 2012 U.S. Dist. LEXIS 19731, at *9-*10 (W.D. Mo. Feb. 16, 2012) (finding no logical relationship where "the only overlap between Plaintiff's FLSA claim and Defendants' counterclaims is a determination of whether

Plaintiff was an exempt or non-exempt employee"). Defendants fail to establish any logical relationship between NY Renaissance's claim for counterclaims related to a purported loan and Plaintiff Belliard's claims for unpaid wages and wage statement/wage notice violations on behalf of the Plaintiffs and an FLSA collective and NYLL class, aside from the existence of the employer/employee relationship. As such, Defendants' "counterclaims are clearly not compulsory; they are permissive." *Torres*, 528 F. Supp. 2d at 467 (discussing faithless servant counterclaims based on claims of sexual harassment and credit card fraud).

The central issues raised by Plaintiffs' claims are their receipt of wages and materials documenting their wage rates. The facts that must be examined to evaluate Plaintiffs' allegations and Defendants' liability include: the number of hours worked by Plaintiffs and the putative collective and class; the amount of wages received by Plaintiffs and the putative collective and class; Defendants' knowledge of the hours worked by Plaintiffs and the putative collective and class; the supervision and control over Plaintiffs, the putative collective and class, and the business operations of Defendant NY Renaissance exercised by Defendants Pirvulescu and Delacroix; and the wage statements and wage notices, if any, provided by Defendants to Plaintiffs and the putative collective and class. In other words, Plaintiffs' claims implicate the types of facts that are typically examined in wage and hour actions.

In contrast, the facts that Defendant pleads in its counterclaims pertain to a purported loan made by NY Renaissance to Plaintiff Belliard. The existence and terms of such a loan are completely irrelevant to Plaintiffs' wage and hour claims. At no point in Plaintiffs' Complaint do they make any mention of loans made by any of the Defendants to either Plaintiff or any member of the putative collective and class. In short, the counterclaims are quasi-contractual claims that bear no relation with Plaintiffs' wage and hour claims. As such, "the facts underlying

Defendants' counterclaim are essentially distinct from those supporting [Plaintiff's] original FLSA and NYLL claims for overtime." *Noriko Ozawa v. Orsini Design Assocs.*, No. 13-cv-1282, 2015 U.S. Dist. LEXIS 29933, at *32-*34 (S.D.N.Y. Mar. 11, 2015) (dismissing counterclaim pertaining to paid leave).

Because these claims rest on entirely different sets of facts, the counterclaims and wage and hour claims "are not so closely related that resolving both sets of issues in one lawsuit would yield judicial efficiency." *Jones*, 358 F.3d at 210; *see also Jung v. Chorus Music Studio, Inc*, No. 13-cv-1494, 2014 U.S. Dist. LEXIS 128103, at *9 (S.D.N.Y. Sept. 11, 2014) ("Defendants' proposed counterclaims for conversion, misappropriation of trade secrets, unjust enrichment… are factually unrelated to Plaintiffs' wage and hour claims"). Judicial efficiency would be hampered by Defendant's counterclaims since there is no overlap between the records and testimony relevant to Plaintiffs' claims and those relevant to Defendant's counterclaims. To permit the parties to seek and analyze evidence as to Defendant's counterclaims would expand the scope of discovery and likely require significant additional motion practice and testimony at a trial. *See, e.g.*, *Jung*, 2014 U.S. Dist. LEXIS 128103, at *9 (in wage and hour action, counterclaims including unjust enrichment would "require a new round of discovery"); *Torres*, 628 F. Supp. 2d at 468. (concluding that counterclaims were permissive, not compulsory, based on "[t]he complete absence of facts in the record regarding the counterclaims… as opposed to the abundant evidence of wage-and-hour violations"); *Hutton v. Grumpie's Pizza & Subs, Inc.*, No. 07-cv-81228, 2008 U.S. Dist. LEXIS 37425, at *6 (S.D. Fla. May 6, 2008) (in FLSA action, counterclaims not compulsory and judicial efficiency would not be served by permitting counterclaims even though "the same witnesses may be involved in both cases").

Moreover, Defendant NY Renaissance would be able to bring a claim for unjust enrichment and the other counterclaims in a state court action since it is based entirely on state law. *Accord Nelson v. CK Nelson, Inc.*, No. 07-cv-61416, 2008 U.S. Dist. LEXIS 43544, at *10-*11 (S.D. Fla. June 2, 2008) ("Defendants should instead file a separate action in the proper forum to pursue the claims alleged in the Counterclaim").

C. Defendant's Counterclaims Do Not Form Part of the Same Case or Controversy as Plaintiffs' Claims

Since Defendant's counterclaims are permissive, not compulsory, it must "form part of the same case or controversy" as Plaintiffs' claims in order to fall under the Court's supplementary jurisdiction. 28 U.S.C. § 1367(a). For a counterclaim to form part of the same case or controversy, "the federal and state claim must stem from the same 'common nucleus of operative fact' […] such that the plaintiff 'would ordinarily be expected to try them all in one judicial proceeding.'" *Montefiore Medical Ctr. v. Teamsters Local 272*, 642 F.3d 321, 332 (2d Cir. 2011) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966)). Courts in the Second Circuit "have traditionally asked whether the facts underlying the federal and state claims substantially overlapped or the federal claim necessarily brought the facts underlying the state claim before the court." *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 335 (2d Cir. 2006) (internal quotation marks omitted).

For the same reasons discussed above, Defendant's counterclaim cannot meet this standard and should be dismissed.

Courts have repeatedly affirmed that "the employment relationship does not establish a 'common nucleus of operative fact' where it is the sole fact connecting Plaintiffs' federal overtime claims and [Defendants'] state law counterclaims." *Torres*, 628 F. Supp. 2d at 468; *see also Weber v. Fujifilm Med. Sys. U.S.A.*, No. 10-cv-401, 2011 U.S. Dist. LEXIS 19119, at *16-

17 (D. Conn. Feb. 28, 2011); *Rivera v. Ndola Pharm Corp.*, 497 F. Supp. 2d 381, 395 (E.D.N.Y. 2007) ("Plaintiff's employment relationship is insufficient to create a 'common nucleus of operative fact' where it is the sole fact connecting plaintiff's federal overtime claim and the remaining state law claims"); *Lyon v. Whisman*, 45 F.3d 758, 763 (3d Cir. 1995) (in FLSA action, declining to exercise supplementary jurisdiction over plaintiff's state-law contract and tort claims); *Morris*, 2012 U.S. Dist. LEXIS 19731 at *11 (finding no common nucleus of operative fact where "Defendants' counterclaims stem in large part from a contract entered into between [the parties] and Plaintiff's FLSA claims stem from Defendants' rounding and overtime policies").

Plaintiffs' claims for unpaid wages and wage statement/wage notice violations on behalf of themselves and an FLSA collective and NYLL class and Defendant's counterclaims regarding the purported loan are governed by entirely different laws. Plaintiffs' claims require analysis pursuant to the Fair Labor Standards Act and New York Labor Law and the regulations promulgated thereunder. As discussed above, the facts relevant to this analysis include: hours worked by Plaintiffs; wages received by Plaintiffs; the role of each Defendant in operating the business of NY Renaissance and deciding how Plaintiffs would be paid; and whether Plaintiffs received wage statements and wage notices. *See, e.g., Torres*, 528 F. Supp. 2d at 467 (plaintiffs' claims centered on defendants' wage and hour practices, while defendants' counterclaims "focus on discrete allegations of misconduct… pertaining to only two plaintiffs").

The law pertinent to Defendant's claims is presumably New York state law regarding unjust enrichment and related issues. The factors courts analyze for evaluating unjust enrichment are: the benefit to the [counterclaim] defendant, the expense of such benefit to the [counterclaim] plaintiff, and whether equity and good conscience require restitution. *See, e.g.,* *Hart v. Rick's Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901, 934 (S.D.N.Y. 2013). The facts that could potentially be relevant to determination of Defendant's claims are: the existence of a loan made by NY Renaissance to Plaintiff Belliard, the terms of such a loan, whether and how the terms of any such loan were memorialized, the circumstances under which the parties entered such a loan, and whether and to what extent Belliard paid monies to NY Renaissance.

Courts evaluating counterclaims asserted in wage and hour matters generally conclude that counterclaims pertaining to other aspects of plaintiff's employment do not arise from the same case or controversy as FLSA and state labor law claims and therefore should be dismissed. *See, e.g.*, *Ozawa*, 2015 U.S. Dist. LEXIS 29933, at *32-34; *Torres*, 628 F. Supp. 2d at 467-68; *Weber*, 2011 U.S. Dist. LEXIS 19119, at *17 ("both sets of claims merely concern, in the broadest sense, that [plaintiff] worked for [defendant]"); *Bullion v. Ramsaran*, No. 07-cv-61463, 2008 U.S. Dist. LEXIS 65833, at *5-*7 (S.D. Fla. July 7, 2008); *Yeseren v. CKSINGH Corp.*, No. 10-cv-253, 2010 U.S. Dist. LEXIS 112122, at *12-*13 (M.D. Fla. Oct. 13, 2010).

Indeed, many courts have held that not only do such state-law counterclaims not form part of the same case or controversy as wage and hour claims but that they are "inappropriate in any proceeding brought to enforce the FLSA minimum wage and overtime provisions." *Brennan v. Heard*, 491 F.2d 1, 4 (5th Cir. 1974); *see also Vizcaino v. Techcrete Constr., Inc.*, No. 13-ca-229, 2014 U.S. Dist. LEXIS 26570, at *4-*5 (W.D.Tex. Mar. 3, 2014) ("Generally speaking, courts have been hesitant to permit an employer to raise a counterclaim in FLSA suits for money the employer claims the employee owes it"); *Morris*, 2012 U.S. Dist. LEXIS 19731, at *13 (citing cases); *accord Quintana v. Explorer Enters.*, No. 09-cv-22420, 2010 U.S. Dist. LEXIS 54683, at *6 (S.D. Fla. June 3, 2010) ("Indemnity against an employee would be contrary to the legislative intent"). Counterclaims filed by employers against employees who file lawsuits to vindicate their employment rights often constitute actionable retaliation, particularly where, as here, the "Defendants filed frivolous counterclaims… that could harm [plaintiff's] reputation and affect [plaintiff's] employment in retaliation for filing the instant suit." *Wermann v. Excel Dentistry, P.C.*, No. 13-cv-7038, 2014 U.S. Dist. LEXIS 29091, at *12 (S.D.N.Y. Feb. 25, 2014); *see also Kreinik v. Showbran Photo, Inc.*, No. 02-cv-1172, 2003 U.S. Dist. LEXIS 18276, at *25-*28 (S.D.N.Y. Oct. 10, 2003) (plaintiff permitted to amend complaint to add retaliation claim based on defendants' filing of counterclaims); *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 162 (E.D.N.Y. 2002) ("The Court is deeply troubled by [Defendant'] counterclaim, which appears to be nothing more than a naked form of retaliation against [plaintiff]… for filing her lawsuit"); *Yankelevitz v. Cornell Univ.*, No. 95-cv-4593, 1996 U.S. Dist. LEXIS 11298, at *17-*18 (S.D.N.Y. Aug. 7, 1996) (denying defendants' motion to strike affirmative defense alleging that counterclaim is retaliatory).

Any award would particularly inappropriate in this instance, where Plaintiffs were deprived of overtime payments, because reduction of any backpay award "would invariably cause Plaintiff not to receive the… payments he was allegedly entitled to under the FLSA." *Nelson*, 2008 U.S. Dist. LEXIS 43544, at *11; *see also Brennan*, 491 F.2d at 4 ("Set-offs against back pay awards deprive the employee of the 'cash in hand' contemplated by the Act"); *Jones v. JGC Dallas LLC*, No. 11-cv-2743, 2012 U.S. Dist. LEXIS 133867, at *12-*13 (N.D. Tex. Aug. 17, 2012), *adopted by* 2012 U.S. Dist. LEXIS 133866 (dismissing unjust enrichment and breach of contract counterclaims, reasoning that "Because Plaintiffs claim that they were not paid their minimum and overtime wages at all, any set-off would result in their final awards dropping below the statutory minimum").

CONCLUSION

Because the Court lacks subject matter jurisdiction over Defendant's counterclaims, the Court should dismiss Defendant's counterclaims without leave to amend.

Dated: New York, New York
September 29, 2015

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